No. 80-5392

APR 9 1981

ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT HOWE, SR., PETITIONER

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES, NORMAN CARLSON, DIRECTOR OF THE UNITED STATES BUREAU OF PRISONS, AND WILLIAM CIUROS, JR., COMMISSIONER OF CORRECTIONS, STATE OF VERMONT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

1. Whether transfer of a state prisoner to federal custody under a contract pursuant to 18 U.S.C. 5003 is prohibited in the absence of a showing that the particular prisoner being transferred has a need for "treatment" that is available in the federal, but not the state, prison system.

2. Whether, if 18 U.S.C. 5003(a) prohibits the transfer of a state prisoner unless that individual is in need of "treatment," "treatment" is properly construed as including maximum security incarceration accompanied by the full range of programs available to similarly situated federal prisoners.

3. Whether, if a finding of an individualized treatment need is a statutory precondition to transfer, and maximum security incarceration satisfies the individualized treatment need requirement, petitioner was afforded all the process that was due him by the hearing conducted by the State of Vermont and the Director's certification that federal facilities were available.

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Bureau of Prisons, U.S. Department of Justice, *1952 Annual Report* 24, 31, 39
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Federal Prison System, U.S. Department of Justice, *Program Statement* (July 14, 1980) 45
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OPINIONS BELOW

The opinion of the court of appeals (J.A. 38-45) is reported at 625 F.2d 454. The opinion of the district court (J.A. 31-37) is reported at 480 F. Supp. 111.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1980. The petition for a writ of certiorari was filed on September 15, 1980, and was granted on January 26, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

18 U.S.C. 5003 provides:

Custody of State offenders

(a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: *Provided*, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

(b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.

(c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

(d) The term "State" as used in this section includes any State, territory, or possession of the United States, and the Canal Zone.

STATEMENT

1. By 1974, the State of Vermont had only one maximum security facility—"[t]he archaic Windsor prison" (*Rebideau* v. *Stoneman*, 398 F. Supp. 805, 808 (D. Vt. 1975), aff'd, 575 F.2d 31 (2d Cir. 1978)). In late December of that year, then Commissioner of Corrections of Vermont, R. Kent Stoneman,

announced that for financial reasons he would close the 187 year old prison by June 30, 1975. Vt. Stat. Ann. tit. 28, § 102(c)(11) (1970) requires the Commissioner of Corrections to close any correctional facility that he deems inadequate, and the Commissioner found Windsor prison to be inadequate in numerous respects (see 398 F. Supp. at 808 n.7).

Prior to the actual closing of the prison, and in contemplation of that event, the United States and Vermont entered into a contract under 18 U.S.C. 5003.[1] The contract recited that Vermont intended to close its only maximum security prison as a result of the agreement, and that the Director of the United States Bureau of Prisons had certified that facilities were available at federal institutions to accommodate up to 40 Vermont prisoners. The contract further provided that in reliance thereon Vermont would "take action to terminate its capability from [*sic*] maximum security within the State." Accordingly, in the event the United States elected to terminate the contract, it was required to give Vermont three years' notice in order "to permit the development of a new max..num security facility or appropriate alternative resource contract usage" (J.A. 10-12).

Windsor prison was closed in August 1975. With its closing, Vermont's correctional facilities were reduced to several minimum security community correctional centers located throughout the State and the Vermont Correction and Diagnostic Treatment Facility at St. Albans, Vermont. The function of the community centers is to integrate prisoners into the community through work release and furlough programs. As its name indicates, the St. Albans facility contains a diagnostic component; it also has a lim-

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[1] The Vermont legislation reciprocal to 18 U.S.C. 5003 is Vt. Stat. Ann. tit. 28, § 706 (Cum. Supp. 1980), which is set out at J.A. 34 n.2.

ited medium security capacity. The facility functions essentially as a holding point for inmates whom the Department of Corrections expects to place in community correctional centers in the foreseeable future. While it has a small inner perimeter security component for short-term incarceration of inmates with high security needs (*e.g.*, for the purpose of holding prisoners in-state when required for state court proceedings), St. Albans is not designed for custody of long-term inmates who present a high security risk. See *Battick* v. *Stoneman*, 421 F. Supp. 213, 216 (D. Vt. 1976).

2. Petitioner was convicted in Vermont state court of first degree murder; he was sentenced to life imprisonment on February 2, 1977. He initially was sent to St. Albans to begin service of his sentence. Because of the nature of his offense and the length of his sentence, however, petitioner was classified as a prisoner requiring maximum security custody (J.A. 39).

Accordingly, on February 22, 1977, the Vermont Department of Corrections held a hearing to determine whether petitioner should be transferred to an out-of-state institution. Pursuant to Vermont Department of Corrections Policy No. 891 (J.A. 14-18), petitioner was afforded advance notice of the hearing and the reasons for the proposed transfer, and the opportunity to be present at the hearing, to testify on his own behalf, to call witnesses, to present documentary evidence and to be represented by lay counsel from the facility staff. Petitioner attended the hearing, at which he was represented by lay counsel who submitted various items of evidence in opposition to the proposed transfer (J.A. 21-29).

The hearing officer recommended that petitioner be transferred to an out-of-state institution on the

ground that "no treatment programs exist in the State of Vermont which could provide both treatment and long term maximum security supervision" for petitioner, who, the hearing officer found, was dangerous and could not be integrated into a community based program. The hearing examiner relied in part on a psychiatric report that described petitioner as "a most dangerous person who could well repeat the same pattern of assaultive behavior toward women at any time in the future" (petitioner's conviction for first degree murder arose out of the rape and strangulation of an elderly woman who lived next door to him). He also found that petitioner would be " 'highly resistant to treatment' " and that he was an escape risk, having escaped from the maximum security wing of St. Albans. On March 9, 1977, the Acting Commissioner of Corrections for the State of Vermont approved petitioner's transfer to the federal prison system (J.A. 19-20, 25-26).

Petitioner was then transferred to federal custody pursuant to the contract between the United States and Vermont described above. Petitioner initially was incarcerated in the federal penitentiary at Atlanta, Georgia. Subsequently, he was transferred to the federal penitentiary at Terre Haute, Indiana (J.A. 33).

3. Thereafter, petitioner filed this civil action in the United States District Court for the District of Vermont, naming as defendants the Attorney General of the United States and the Director of the United States Bureau of Prisons. Relying on the then recent decision in *Lono* v. *Fenton*, 581 F.2d 645 (7th Cir. 1978) (en banc), petitioner sought an injunction and a declaratory judgment on the ground that the federal defendants were not authorized to accept custody

of him unless he needed and there existed a specialized treatment program available in the federal prison system and not available in the state facilities.[2] Respondent Ciuros' predecessor, the then Acting Commissioner of Corrections of the State of Vermont, was permitted to intervene in the action (J.A. 31-32).

Following a trial, the district court denied any relief, holding (J.A. 36-37) that

> notwithstanding any indication from the legislative history of the [A]ct to the contrary, * * * the [A]ct plainly and unambiguously requires no showing of specialized treatment needs or facilities before a Vermont state prisoner may be transferred to the federal prison system in accordance with the contract under which [petitioner] was so transferred. * * * In contracting with state officials, 18 U.S.C. 5003(a) requires nothing more of the Director of the Bureau of Prisons than a certification that facilities exist within the federal system in which state prisoners may be accommodated. That requirement has been met in the case at hand.

The court of appeals affirmed, stating concisely (J.A. 44) that petitioner's argument "has no basis in the language of the statute."

4. While the petition for a writ of certiorari to review the court of appeals' decision was pending, the Seventh Circuit decided *Anthony* v. *Wilkinson*, Nos. 79-2362, etc. (Dec. 23, 1980), petition for cert. pending *sub nom. Hawaii* v. *Mederios*, No. 80-1315 (filed Feb. 4, 1981). For the most part, that court adhered

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[2] At the time petitioner filed the complaint in this case, he was temporarily back at St. Albans to attend state court proceedings in Vermont (J.A. 4).

to the view it had expressed in *Lono* that Section 5003 "requires a showing of a state prisoner's need for specialized treatment as a condition precedent to transfer to the federal prison system" (slip op. 11), observing that "principles of stare decisis make it quite undesirable for us to reconsider here the legal propositions announced in *Lono*" (slip op. 13). While recognizing (slip op. at 17) that transfers based on security considerations may satisfy the "specialized treatment" requirement of *Lono* "if a sufficient array of programs is provided in connection with incarceration in a maximum security prison," the court nonetheless held that the transfers at issue were impermissible because the prisoners had not been accorded due process.[3] Contrasting the discretionary transfer of prisoners within a particular system upheld by this Court in *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes*, 427 U.S. 236 (1976), with the state-to-federal transfer authorized by 18 U.S.C. 5003, the *Anthony* court found (slip op. 21) that Section 5003 creates in state prisoners "a liberty interest deserving of due process protection." Accordingly, the court held that "there must be a federally conducted hearing" (slip op. 27-29) accompanied by the same panoply of procedural protections that is required in parole revocation hearings (see *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972)), in order to determine "the need for specialized treatment and how it could be met in the federal system" (slip op. 26).

Thereafter, both the United States and the State of Vermont acquiesced in the petition for a writ of certiorari in this case on the ground that this Court's intervention is necessary to resolve the conflict be-

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[3] In *Lono*, the court had found it unnecessary to decide what process was due a state prisoner prior to his transfer to the federal system (581 F.2d at 646).

tween *Lono* and *Anthony*, on the one hand, and the decisions of the court below, the First Circuit (in *Sisbarro* v. *Warden*, 592 F.2d 1, cert. denied, 444 U.S. 849 (1979)) and the Third Circuit (in *Beshaw* v. *Fenton*, No. 79-1777 (Dec. 15, 1980), petition for cert. pending, No. 80-6354 (filed Mar. 13, 1981)), on the other hand.[4]

SUMMARY OF ARGUMENT

I.

18 U.S.C. 5003(a) was enacted in 1952, at a time when the federal prison system was not filled to capacity, and in response to requests by the states that the Federal Bureau of Prisons assume custody of state offenders for whom state facilities were inadequate. The statute authorizes the Attorney General, when the Director of the Federal Bureau of Prisons certifies that "adequate and proper treatment facilities and personnel are available," to contract with the states for the "custody, care, subsistence, educa-

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[4] Subsequent to the Court's granting the petition for a writ of certiorari in this case, the Tenth Circuit followed "the clear weight of authority" holding that Section 5003 does not condition the transfer of state prisoners to the federal system on a showing of a specialized treatment need available only in the federal system. *Fletcher* v. *Warden*, Nos. 79-1156, etc. (Feb. 13, 1981).

While the latest Seventh Circuit decision appears to represent some modification of its prior outright rejection of security needs as a justification for transfer under Section 5003, that court continues to read the statute as being significantly conditioned upon the need for and provision of specialized treatment in the federal facilities. Its approach thus continues to conflict with the interpretation given to the same statute by the First, Second, Third and now Tenth Circuits. Indeed, the conflict among the circuits is aggravated by the addition of new procedural requirements by the Seventh Circuit not imposed by the others.

tion, treatment, and training" of state prisoners. Despite the broad authority apparently conferred by this language, petitioner argues that the statute authorizes the transfer of a state prisoner to federal custody only for the purpose of specialized treatment, and that prior to the contemplated transfer the statute requires the federal government to make an individualized determination that a prospective transferee is in need of some specialized treatment that is available in the federal, but not in the state, prison system.

A. Petitioner's argument has no basis in the statutory language. Treatment is not the only purpose for transfer that is authorized by 18 U.S.C. 5003 (a). Rather, the statute also provides for contracts for the custody, care, subsistence, education and training of state prisoners.

Nor is there any basis in 18 U.S.C. 5003(a) for a requirement that the federal government (or any body) make a case-by-case determination of whether each state prisoner whose transfer is sought needs some sort of specialized treatment available only in the federal system. Nothing on the face of Section 5003(a) suggests that it does, or was intended to, confer protections upon the anticipated state transferees. Rather, Section 5003(a)'s certification requirement is simply an internal agency housekeeping measure designed to ensure that the contracting federal official knows whether there are sufficient resources within the federal prison system to warrant the exercise of the statutory authority to contract. Moreover, the language of Section 5003(a) contemplates contracts for *groups* of prisoners and refers to the certification in connection with the *group* contracts contemplated by it.

In any event, as is true of other statutorily required certifications by Department of Justice officials, the certification required by Section 5003(a) is not subject to judicial scrutiny at the behest of individual prisoners. Such judicial restraint is particularly appropriate here, where the certification specified by the statute is purely internal to the Executive Branch. Indeed, once the Attorney General delegated the responsibility to enter into Section 5003 contracts to the Director of the Bureau of Prisons (see 28 C.F.R. 0.95 (g)), the certification requirement would appear to have become superfluous.

B. We view the plain language of Section 5003(a) as so unambiguous as to suggest that "further inquiry may be unnecessary" (*Ernst & Ernst* v *Hochfelder*, 425 U.S. 185, 201 (1976)). Even resort to the legislative history does not avail petitioner, however. That history reflects that the statute was enacted to provide the states opportunities to place prisoners in federal custody, "reciprocal" to the already authorized (18 U.S.C. 4002) transfer of federal prisoners to state custody, which was and is permitted without reference to any "treatment" needs. Congress also believed that the statute would bring about economies in the operation of the federal prison system.

Most of the legislative history on which petitioner relies (Br. 16-17) merely describes the types of requests the Bureau had received from the states, but does not reflect a Congressional purpose to restrict the Bureau's administrative discretion to determine the types of prisoners it would contract to receive or the purposes for which it might assume federal custody over state prisoners. Moreover, from Congress's point of view of reducing the overhead expenses of maintaining the federal institutions by taking in state prisoners, for whom the states would reimburse the

federal government, it mattered not whether the state transferees would be in need of treatment.

Nowhere in the legislative history is there a shred of evidence that, in conferring upon the Attorney General broad authority to contract with the states for the "custody, care, subsistence, education, treatment, and training" of state prisoners, Congress intended to confer any statutory *protection* on individual state prisoners against transfer to federal custody—to be enforced by a plethora of suits in the federal courts. Rather, the statute was quite clearly enacted for the benefits it was expected to confer upon state and federal correctional systems, and it should be construed in light of that underlying purpose.

C. Ever since Section 5003 was enacted in 1952, the Bureau has construed it as placing no restrictions on the Attorney General's authority to contract for custody of state prisoners. This contemporaneous and consistent construction of a statute by the agency that suggested its enactment and is charged with its enforcement is entitled to great deference.

D. Finally, to construe Section 5003(a) as narrowly as petitioner suggests would thwart the statute's underlying principle of matching surplus federal facilities with the perceived needs of the states. As construed and applied by the Bureau of Prisons, the statute's contracting authorization has fulfilled important and compelling needs of state correctional systems. Petitioner's proposed construction of the statute would deprive the federal government of the authority not only to aid the states in secure incarceration of dangerous offenders, but also to take custody of state prisoners whose lives are endangered if they remain in the state prison system or who, although they do not need "treatment" in the narrow

sense urged by petitioner, could benefit from access to education or training programs available in the federal system.

II.

Even if the statute read as petitioner urges this Court to construe it—that no state prisoner may be transferred to the federal system unless he needs specialized treatment available only in the federal prison system—petitioner nonetheless is properly in federal custody because he needs maximum security incarceration not available in Vermont, and because provision of secure facilities offering programs appropriate for long term custodial confinement constitutes "treatment" within the meaning of the statute.

This is one issue on which the circuits are not divided. Even the Seventh Circuit, which alone supports petitioner's primary submission that the federal authority to accept custody of state prisoners is limited to individuals who are in need of "treatment," includes within the definition of "treatment" security and protective custody, where accompanied by a sufficient array of programs. Moreover, a construction of the word "treatment" that includes maximum security incarceration and protective custody comports with the Bureau's contemporaneous and consistent construction of the statute. In its first annual report after enactment of Section 5003, the Bureau stated that the new authority would encompass transfer of "a vicious intractable offender who cannot be handled readily in [the state's] own institutions * * *."

III.

Assuming *arguendo* that Section 5003(a) creates a liberty interest in a state prisoner not to be transferred to federal custody except for the purpose of treatment, petitioner has received any process that was due him.

Petitioner contends that the *federal government* must afford a state prisoner who is scheduled for transfer to the federal system the same amount of process that is due a parolee whose parole is sought to be revoked (*Morrissey* v. *Brewer*, 408 U.S. 471 1972)) or a state prisoner whose transfer to a mental institution is sought (*Vitek* v. *Jones*, 445 U.S. 480 (1980)). But petitioner's interest in not being transferred from a state institution to a federal institution is far less substantial than a parolee's interest in remaining free from *any* incarceration or a prisoner's interest in not being arbitrarily classified as mentally ill and placed in a mental hospital.

Moreover, there is no basis in the statute for requiring the Director of the Federal Bureau of Prisons to duplicate the State's determinations whether a state prisoner needs specialized treatment and whether the state could afford him such treatment. Indeed, such a decision-making process would increase the likelihood of an erroneous determination, since those questions are the ones that the Director of the Federal Bureau of Prisons is least qualified to answer. In sum, whatever process, if any, may have been due petitioner, it was afforded him by the hearing that was held by the State of Vermont and the Director's certification that federal facilities were available.

ARGUMENT

After being convicted of first degree murder and sentenced to life imprisonment, petitioner was classified by Vermont prison authorities as "a most dangerous person" and an escape risk who required maximum security confinement. Because Vermont has

no facilities for long-term custody of inmates under maximum security conditions, it decided that petitioner should be transferred to federal custody pursuant to the contract previously entered into between it and the United States under 18 U.S.C. 5003. Subsection (a) of that statute provides, in pertinent part, as follows:

> The Attorney General, when the Director [of the Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory * * *.

While petitioner does not claim any substantive constitutional right to be imprisoned only in the state of his conviction (Br. 8-9, 41 & n.10, 42)[6] or deny that the formal requirements of the statute (*i.e.*, the existence of a certification by the Director and of a contract between the United States and Vermont) have been met, he nevertheless challenges the lawful-

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[6] In view of petitioner's concession, indeed, suggestion (Br. 8-9, 41 & n.10, 42) that he could be incarcerated outside the State of Vermont pursuant to either the New England Interstate Corrections Compact, Vt. Stat. Ann. tit. 28, § 1401 *et seq.* (1970), or the Interstate Corrections Compact, Vt. Stat. Ann. tit. 28, § 1601 *et seq.* (1970), petitioner would have no complaint if he found himself in exactly the same position, by virtue of an agreement between Vermont and the State of Indiana to house Vermont prisoners in an Indiana facility located at Terre Haute, rather than by virtue of an agreement between the federal government and Vermont.

ness of his transfer to federal custody upon both substantive and procedural grounds.

Petitioner's substantive claim is that his placement in federal custody violates the requirements of Section 5003, which in his view prohibits such transfers except for the purpose of "treatment" of the prisoner. The concept of "treatment," he argues, is limited to such things as medical or psychiatric treatment, alcohol or drug rehabilitation programs, and special facilities for juvenile or youth offenders; it does not, he contends, include facilities for secure incarceration of dangerous prisoners. Petitioner's procedural due process claim goes from the premise that the statute requires an individualized determination of a transferee's treatment need to the conclusion that any transfer under the statute is invalid unless the federal government has made a determination, under appropriate procedures, matching the treatment needs of the individual to the special facilities available in the federal but not the state prison system to meet such needs.

The issues presented by this case are thus three, which ought logically to be considered in sequence:

(1) Where the Director has certified that facilities are available, and there exists a contract pursuant to which a prisoner is transferred, is that transfer prohibited by Section 5003 in the absence of a showing that the particular prisoner being transferred has a need for "treatment" that is available in the federal but not the state prison system? In Part I, *infra*, we argue that the statute imposes no condition precedent to transfer that the purpose of a particular inmate's transfer be for "treatment"; rather, the transfer is lawful when the formal certification and contract re-

quirements have been fulfilled. If we are correct in this, the case is at an end.

(2) If, however, the Court concludes that Section 5003 is properly construed as a prohibition upon the transfer of any state prisoner unless that individual is in need of "treatment," it should next consider the content of the "treatment" requirement. In Part II of this brief we argue that the concept of "treatment" is a broad one encompassing the provision of secure custodial conditions (accompanied by the full range of customary programs for similarly situated federal convicts) for dangerous or escape-prone prisoners.

(3) If a finding of individualized treatment need is a statutory precondition to transfer, then we agree that some process would be due in connection with the inquiry into petitioner's need for "treatment." In Part III, *infra*, we argue that the hearing afforded petitioner by Vermont prior to his transfer fully satisfied any applicable procedural due process requirement, and that no separate federal hearing is required.

I. THE AUTHORITY OF THE FEDERAL GOVERNMENT TO ACCEPT CUSTODY OF STATE PRISONERS UNDER 18 U.S.C. 5003(a) IS NOT CONDITIONED ON A SHOWING THAT THE STATE PRISONER IS IN NEED OF SPECIALIZED TREATMENT AVAILABLE ONLY IN THE FEDERAL PRISON SYSTEM

A. The Plain Language of the Statute Confers Broad Authority Upon the Attorney General to Contract for Custody of State Prisoners Without Reference to a Prisoner's Individualized Treatment Needs

It is by now axiomatic that "the starting point for interpreting a statute is the language itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also *Rubin* v. *United States*, No. 79-1013 (Jan. 21, 1981), slip op. 5; *Lewis* v. *United States*, 445 U.S. 55, 60 (1980). The plain language of 18 U.S.C. 5003(a) authorizes the Attorney General to contract not only for the purpose of treatment, but also for the purposes of "custody, care, subsistence, education, * * * and training" of state prisoners—"a list that runs the gamut of penological purposes." *Sisbarro* v. *Warden*, 592 F.2d 1, 4 (1st Cir.), cert. denied, 444 U.S. 849 (1979). As the court below found (J.A. 44), "[n]othing in this grammatical construction gives 'treatment' the primacy which [petitioner] contends for, or provides a basis for concluding that, whatever other services are provided, treatment must in all events be furnished prisoners subject to any federal-state contract authorized by the statute." Accord, *Fletcher* v. *Warden*, Nos. 79-1156, etc. (10th Cir. Feb. 13, 1981);

Beshaw v. *Fenton*, No. 79-1777 (3d Cir. Dec. 15, 1980), petition for cert. pending, No. 80-6354 (filed Mar. 13, 1981); *Sisbarro* v. *Warden*, *supra*.[6]

1. Petitioner argues (Br. 11-12) that the phrase in the statute that the Director "shall certify that proper and adequate treatment facilities and personnel are available" requires the federal government to make a pre-transfer determination that each prisoner whom a state proposes to transfer to federal custody is in need of specialized treatment available only in the federal system. Petitioner nowhere attempts to explain how the words of the statute, including its certification provision, could be read to state such a requirement. In effect, without pausing to analyze the language actually used by Congress, petitioner simply urges the Court to read Section 5003(a) as if it provided that "no state prisoner may be transferred to the federal prison system until the Director certifies that he is in need of specialized treatment available only in the federal prison system."

To be sure, statutes so worded, "which expressly identif[y] the class Congress intended to benefit" (*Cannon* v. *University of Chicago*, 441 U.S. 677, 690 (1979)), have been held to create individualized federal rights. In *Cannon*, for instance, the Court held that Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), which provides that "[n]o person in the United States shall" be discriminated against on the basis of sex by any

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[6] We note that Section 5003(a)-(c), as passed by both Houses of Congress (97 Cong. Rec. 13543 (1951); 98 Cong. Rec. 4801 (1952)), carried the title "Custody of State offenders." While a title does not control over the terms of a statute (*United States* v. *Will*, No. 79-983 (Dec. 15, 1980), slip op. 28), here the title supports the conclusion drawn from the statutory language—that there are no limitations on the purposes for which a state prisoner may be transferred to federal custody; simple custody is a sufficient reason for transfer.

education program or activity receiving federal financial assistance, includes a private right of action. Similarly, *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), found individual rights to have been created by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, which provides that "no person" shall be denied the right to vote for failure to comply with new state enactments that were covered by, but had not been approved under, that statute.

By contrast, however, the statute under consideration in this case—18 U.S.C. 5003(a)—does not contain the individualized "no person" formulation.[7] Rather, Section 5003(a) is simply a broad grant of authority to the Attorney General to contract with the states for the full range of penological purposes. Nothing on the face of Section 5003(a) suggests that it does or was intended to confer protections upon the anticipated state transferees. Certainly the certification clause—on which petitioner's argument necessarily depends to overcome the otherwise broad contracting authority expressly given to the Attorney General—does not by its terms condition or restrict that power or suggest that individual transfers are subject to attack in federal court.

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[7] We note, however, that Congress did employ the more individualized language in subsection (c), which provides:

> Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.

In contrast to petitioner's situation, a state prisoner in federal custody claiming some denial to him of rights or privileges conferred by law or regulation on federal prisoners could at least point to the language of this subsection in arguing that it confers a statutory right on him to equal treatment.

We submit that the certification requirement is properly understood as nothing more than an internal agency housekeeping measure designed to ensure that the contracting federal official knows whether there are sufficient resources within the federal prison system to warrant the exercise of the statutory authority to contract.[8] Since Congress presumably contemplated that the Attorney General might delegate the contracting function to some other bureau or division within the Department of Justice, the certification requirement ensured that the Department would not contract to take state prisoners without ascertaining from the Bureau of Prisons that there were adequate facilities and personnel for them.[9]

Our contention that Section 5003(a) does not require determinations of individual treatment needs is further supported by the fact that its statutory language contemplates that federal-state contracts will be for *groups* of prisoners—"[t]he Attorney Gen-

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[8] Cf. *Kissinger* v. *Reporters Committee for Freedom of the Press*, 445 U.S. 136, 149 (1980) (primary purpose of the Federal Records Act of 1950, 44 U.S.C. 2901 *et seq.*, and the Records Disposal Act, 44 U.S.C. 3314, was the "establishment of a useful system of documentation that will enable [the executive] to have the information he needs available when he needs it;" quoting from S. Rep. No. 2140, 81st Cong., 2d Sess. 4 (1950)); *American Farm Lines* v. *Black Ball Freight Service*, 397 U.S. 532 (1970) (ICC regulations that required motor carriers to provide information demonstrating that they met the statutory standards "were intended primarily to facilitate the development of relevant information for the Commission's use in deciding applications * * *" (*id.* at 538) and were "mere aids to the exercise of the agency's independent discretion" (*id.* at 539)).

[9] In view of the fact that the individual to whom the Attorney General has delegated his authority to contract under Section 5003(a) is the Director of the Bureau of Prisons (28 C.F.R. 0.95(g)), the formal certification procedure may no longer be necessary.

eral * * * is hereby authorized to contract with the proper officials of *a* State or Territory for the custody, care, subsistence, education, treatment, and training of *persons* convicted of criminal offenses in the courts of such State or Territory" (emphasis added). Since the statute refers to the certification in connection with the *group* contract contemplated by it, Section 5003(a) does not by its terms or by reasonable implication require that the Director certify that a particular institution can satisfy specialized treatment needs of a particular transferee.

In any event, the certification is not subject to judicial scrutiny at the behest of individual prisoners. When presented with challenges to other requirements of certifications by Department of Justice officials, this Court and several courts of appeals have consistently restricted judicial inquiry to considering only whether the certification required by statute was made, and have refused requests by litigants to look behind the face of the certification. See *Ullman* v. *United States*, 350 U.S. 422, 432-434 (1956) (involving former 18 U.S.C. (1964 ed.) 3486, which conditioned grants of immunity on, *inter alia*, "the judgment of a United States Attorney [that] the testimony of any witness * * * is necessary to the public interest * * *"); [10] *United States* v. *Carter*, 493 F.2d 704 (2d Cir. 1974) (involving 18 U.S.C. 3503, which requires that a motion by the government to take the

[10] Similarly, 18 U.S.C. 6003, which replaced 18 U.S.C. (1964 ed.) 3486, presently provides that a United States Attorney may, with the approval of the Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request that a witness be granted immunity when, in the judgment of the United States Attorney, "the testimony or other information from such individual may be necessary to the public interest."

deposition of a prospective witness or party contain a certification by the Attorney General or his designee that "the legal proceeding is against a person who is believed to have participated in an organized criminal activity"); *United States* v. *Kleve*, 465 F.2d 187, 190 (8th Cir. 1972) (18 U.S.C. 3731, permitting the United States to appeal from an order suppressing or excluding evidence or requiring the return of seized property if the United States Attorney certifies that "the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding"); *United States* v. *Singleton*, 460 F.2d 1148 (2d Cir. 1972), cert. denied, 410 U.S. 984 (1973) (18 U.S.C. 3503); *United States* v. *Comiskey*, 460 F.2d 1293, 1297-1298 (7th Cir. 1972) (18 U.S.C. 3731).[11]

In all of the foregoing cases, the certification was statutorily required as a prerequisite to some judicial action, yet the courts resisted invitations to look be-

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[11] 18 U.S.C. 5012 specifies that "[n]o youth offender shall be committed to the Attorney General under [the Federal Youth Corrections Act] until the Director shall certify that proper and adequate treatment facilities and personnel have been provided." The only court of appeals decision of which we are aware that construes that certification provision holds that it merely concerned "the starting point for the Act," that it had been satisfied by the Attorney General's one-time certification of certain facilities as available to receive Youth Corrections Act commitments, and that a YCA sentence could not be challenged by an individual offender for lack of a certification in his case. *Robinson* v. *United States*, 474 F.2d 1085, 1091 (10th Cir. 1973).

While 18 U.S.C. 3651 (suspension of sentence and probation) and 18 U.S.C. 4253 (commitment of addicts) also provide for certification of treatment facilities, personnel, and programs by the Attorney General, we have found no cases construing those provisions.

hind them. The appropriateness of such restraint is even greater where, as here, the certification specified by the statute is purely internal within the Executive Branch, to be made by a subordinate to his superior. Indeed, once the Attorney General delegated the responsibility to enter into Section 5003 contracts to the Director of the Bureau of Prisons (28 C.F.R. 0.95(g)), the certification requirement would appear to have become superfluous. For this reason, the fact that the certification contained in the contract with Vermont is not in the precise language of the statute (which of course does not require that any certification be made by the Director to the contracting state) affords petitioner no ground for relief.

2. Petitioner further contends (Br. 11-20) that the phrase "treatment facilities" in Section 5003 shows that Congress intended narrowly to limit the purposes for which a state prisoner may be transferred to federal custody. To be sure, other federal statutes refer to federal prisons as "penal and correctional institutions." See, *e.g.*, 18 U.S.C. 4001, 4005, 4042. But those provisions, which were enacted by different Congresses from that which enacted Section 5003, concern the operation and management of federal prisons as institutional entities. Section 5003, in contrast, recognizes the availability for state prisoners of the broad range of treatment facilities provided within the various federal penal and correctional institutions. And, given the number and variety of treatment programs available in the federal prison system both in the 1950's and now,[12] Congress's

[12] Treatment facilities that were available in the federal prison system in the early 1950's included, *inter alia*, programs for narcotic addicts, juvenile facilities, programs especially designed for Puerto Ricans, educational and vocational

reference to "treatment facilities" must be viewed as simply an accurate characterization of the broad spectrum of services and programs potentially available to state prison transferees. As the court below explained (J.A. 45), the phrase chosen by Congress "simply named [federal prisons] in terms of the most laudable (if, perhaps, least often realized) goal the institutions serve, namely, the reform of prisoners through treatment."

3. Petitioner's construction of subsection 5003(a) also appears to render 18 U.S.C. 5003 internally inconsistent. According to petitioner's view, he can only be housed in or moved to a federal prison that affords him "specialized treatment" that he needs and cannot get in state prison. However, federal prisoners can be transferred from one place of confinement to another at the sole discretion of the Attorney General (18 U.S.C. 4082(b)), and subsection (c) of 18 U.S.C. 5003 provides that state prisoners

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programs, religious programs, employment, medical and dental services, recreation, individual and group psychiatric counseling, music programs, and Alcoholics Anonymous groups. Bureau of Prisons, Department of Justice, *1952 Annual Report* 5, 12, 14, 15, 19, 22, 23, 24, 26; Bureau of Prisons, U.S. Department of Justice, *The Terre Haute Penitentiary* 12, 16 (1953); Bureau of Prisons, U.S. Department of Justice, *Federal Correctional Institution La Tuna, Texas* 14, 15 (1955).

Currently, the federal system provides educational programs, medical, dental, and optical services, psychiatric and psychological services, drug abuse programs, alcohol treatment facilities, Youth Corrections Act programs, marriage and family counseling, vocational training, employment in prison industries, work release programs, chaplaincy services, recreational facilities and group activities such as the Jaycees. See Federal Prison System, U.S. Department of Justice, *Facilities 1980*.

transferred thereunder will "be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed." Accordingly, consideration of 5003(a) and 5003(c) together suggests that the certification required by the former is only that the federal prison system have the capacity to afford state prisoners the same facilities it affords federal prisoners.[13]

B. The Legislative History Confirms that the Contractual Authority Conferred on the Attorney General by 18 U.S. 5003 is very Broad

While the plain language of Section 5003 is so unambiguous as to suggest that "further inquiry may be unnecessary" (*Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 201 (1976)), an examination of the legis-

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[13] Petitioner's additional reliance on 18 U.S.C. 4001(a), which provides that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress," is also misplaced. The legislative history of 18 U.S.C. 4001(a) reveals that it was enacted in conjunction with the repeal of the Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950), 50 U.S.C. (1964 ed.) 811-826. The Emergency Detention Act had permitted, upon a declaration of "internal security emergency" by the President, the detention of persons if reasonable ground existed to believe they would engage in acts of espionage or sabotage. Section 4001(a) thus was enacted as a guarantee against the unlawful detention of persons who had not been convicted, a class of which petitioner clearly is not a member. See H.R. Rep. No. 92-116, 92d Cong., 1st Sess. (1971).

In any event, Section 4001(a) does not further petitioner's argument. If, as we contend, he is lawfully incarcerated in the Federal Prison System pursuant to 18 U.S.C. 5003(a), then Section 4001 is fully satisfied.

lative history confirms that the contractual authority conferred on the Attorney General by Section 5003 is very broad.

S. 2160, 82d Cong., 1st Sess. (1951), which contained what is now 18 U.S.C. 5003(a)-(c), was enacted in 1952 in response to requests by the states (which had housed federal prisoners until the federal government built its own institutions) that the Federal Bureau of Prisons assume custody of state of-offenders for whom state facilities were inadequate. In introducing S. 2160, Senator McCarran gave the following explanation for it (97 Cong. Rec. 13543 (1951); emphasis supplied):

> At the present time the Attorney General is authorized by law to make contracts with State officials for the purpose of temporary confinement of Federal prisoners. This bill would authorize a more or less *reciprocal arrangement* whereby, under certain conditions in a limited category of cases, at no expense to the Federal Government, the Attorney General may contract with State officials for the custody of persons convicted and sentenced under State laws.

The legislation to which Senator McCarran referred as authorizing the United States to contract with the states for the housing of federal prisoners is 18 U.S.C. 4002. That statute authorizes the Director of the Bureau of Prisons to contract with local authorities for the "imprisonment, subsistence, care, and proper employment" of "persons held under authority of any enactment of Congress." Petitioner's narrow construction of Section 5003(a) is thus at odds with Senator McCarran's description of that statute as "reciprocal" to the Director's broad authority to transfer federal prisoners to local facilities under 18 U.S.C. 4002. Contrary to peti-

tioner's suggestion (Br. 17), Senator McCarran's reference to "certain conditions in a limited category of cases" probably reflects his belief that in most cases the states would have the necessary facilities to handle their own prisoners, as has proven to be true (see note 17, *infra*).

Moreover, most of the legislative history relied on by petitioner (Br. 16-17) was more concerned with explaining the states' need for a measure such as S. 2160 than with describing the situations to which it would apply, if enacted. Thus, the references in the legislative history to the Bureau of Prisons undertaking the "custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but are not available in the States" (H.R. Rep. No. 1663, 82d Cong., 2d Sess. 1 (1952); see also *id.* at 3; S. Rep. No. 978, 82d Cong., 1st Sess. 1, 2 (1951)) merely described the specific requests that the Bureau had received from the states.

The action taken by Congress was not wholly devoid of self-interest, however. Rather, Congress recognized (H.R. Rep. No. 1663, *supra*, at 1-2) that there was a surplus of federal facilities and that "the accommodation of State prisoners will materially help to reduce the overhead expenses of maintaining and running these Federal prison institutions. While there will be additional expenses in connection with an inmate's subsistence, medications, etc., which will, of course, be charged to the states, the use of Federal facilities and personnel—a continuing expense heretofore maintained through Federal appropriation—will also be charged to the states, thus reducing these fixed expenses of the Government." For Congress's own purposes, it was thus immaterial whether the transferees would be in need of treatment.

Only one sentence of one committee report (which was not even printed until five months after the Senate had already passed S. 2160)[14] even tangentially supports petitioner's contention that a state prisoner cannot be transferred to federal custody unless he is determined to need specialized treatment available only in the federal prison system. In H.R. Rep. No. 1663, *supra*, at 2, the House Committee on the Judiciary stated that "the proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment." But even that statement makes no mention of "specialized" treatment, a pre-transfer determination, or unavailability of facilities in the state system. This single statement—otherwise unexplained—is far too fragile a basis, we submit, for disregarding the plain language of the statute and the Bureau's contemporaneous and consistent construction of it (see pages 30-34, *infra*).

We note that nowhere in the legislative history is there a shred of evidence that, in conferring upon the Attorney General broad authority to contract with the states for "the custody, care, subsistence, education, treatment, and training" of state prisoners, Congress thought it was conferring any statutory *protection* on individual state prisoners against transfer to federal custody—to be enforced by a plethora of suits in federal courts. While such individuals were the subject of the legislation, they were not, except perhaps indirectly, its intended beneficiaries. Rather, the purpose of the statute unquestionably

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[14] The Senate passed S. 2160 on Oct. 19, 1951 (97 Cong. Rec. 13543). H.R. Rep. No. 1663 was published on Mar. 27, 1952, the House passed S. 2160 on May 5, 1952 (98 Cong. Rec. 4801), and President Truman signed it into law on May 9, 1952 (98 Cong. Rec. 4967).

was to benefit the state and federal prison systems by allowing for transfers of prisoners between them on a reciprocal basis, pursuant to contract.

Finally, even supposing that the legislative history of Section 5003 reflects Congress's expectation that, notwithstanding the broadly worded authorization contained in the language of the statute, the authority would be used solely for a narrow class of individuals with specialized treatment needs, it does not follow that a litigative remedy is necessary or appropriate to enforce such expectations or that Congress intended to make transfers for purposes other than "treatment" unlawful. Whatever views Congress may have had with regard to the possibility of creating a "national" prison system (see Pet. Br. 9, 45-46), the mechanisms for dealing with such questions are, first, the exercise of sound discretion by the Attorney General and, second, Congressional oversight and legislative revision in the event it is concluded that the contracting power is being abused.[15]

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[15] Section 5003 was amended in 1965 by the addition of subsection (d), which permitted the transfer of United States citizens incarcerated in the Panama Canal Zone Penitentiary to federal institutions in the continental United States. Pub. L. No. 89-267, 79 Stat. 990.

More recently, the Senate Committee on the Judiciary, which was considering a comprehensive revision of the United States Criminal Code, proposed that Section 5003(a) be replaced with the following provision, from which any reference to "treatment" or "treatment facilities" is omitted:

> The Director [of the Bureau of Prisons] may contract with the proper authorities of a State, territory, or locality, or, at the request of the tribal leaders, with an Indian tribe, for the official detention, including safekeeping, care, subsistence, correctional programs, and employment, in a federal penal or correctional facility, of a person convicted of an offense in a court of such State or territory or Indian tribe, if

C. The Bureau's Contemporaneous and Consistent Construction of the Statute Has Been that No Individualized Treatment Need Must Be Shown as a Precondition to a Transfer

The question in this case concerns the scope of the authority conferred by Congress upon the Attorney General to contract for and receive custody of state prisoners. That authority has now been exercised by the Bureau of Prisons for nearly 30 years. It is well settled that

> [w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the [agency's interpretation] we need not find that its construction is the

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the Director finds that proper and adequate penal or correctional facilities and personnel are available.

S. 1772, 96th Cong., 1st Sess. § 573(b) (1979). S. 1722 was reported favorably by the Committee on Jan. 17, 1980. The Committee Report that accompanied the bill gave no explanation for the deletion of the "treatment" language. S. Rep. No. 96-553, 96th Cong., 2d Sess. 1223 (1980).

Thereafter, the House Committee on the Judiciary reported to the full House of Representatives its recommended revisions of the Criminal Code. Included in that bill was a substantial reenactment of the current Section 5008(a). H.R. 6915, 96th Cong., 2d Sess. § 3918(a) (1980). The Committee Report accompanying the bill noted the conflict between, on the one hand, the decision below and *Sisbarro* v. *Warden*, 592 F.2d 1 (1st Cir.), cert. denied 444 U.S. 849 (1979), and, on the other hand, *Lono* v. *Fenton*, 581 F. 2d 645 (7th Cir. 1978) (en banc), but "express[ed] no views concerning the correctness of cases construing the current law." H.R. Rep. No. 96-1396, 96th Cong., 2d Sess. 480 (1980). Neither S. 1722 nor H.R. 6915 passed its respective house before the 96th Congress adjourned.

> only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." * * * "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.' "

Udall v. *Tallman*, 380 U.S. 1, 16 (1965) (citations omitted). See also *E.I. DuPont DeNemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977). And where, as here, it was the agency (the Bureau) that suggested the statute's enactment to Congress (H.R. Rep. No. 1663, *supra*, at 2), deference is even more clearly in order. *United States* v. *American Trucking Associations, Inc.*, 310 U.S. 534, 539 (1940).

Contrary to petitioner's suggestion (Br. 33-37), the Bureau contemporaneously construed 18 U.S.C. 5003(a) as placing no restrictions on the purposes for which a state prisoner could be transferred to the federal system; simple custody was deemed a sufficient reason. In its *1952 Annual Report* (at 16-17; emphasis supplied),[16] the Bureau of Prisons described the then new statute as follows:

> [It] authorize[s] the Attorney General, when adequate facilities and personnel are available, to contract with State officials for the care and custody of State prisoners. The act provides that any such contract should provide for reimbursing the United States in full for all costs or other expenses involved.

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[16] We are lodging ten photocopies of the *1952 Annual Report* of the Bureau of Prisons with the Court and have served copies on petitioner and respondent Ciuros.

> The confinement of Federal prisoners in State institutions has been authorized since 1776. In fact, until near the turn of the present century most persons sentenced to imprisonment by United States courts were boarded in State prisons. The present act affords an opportunity for reciprocity which had not hitherto existed. While it is not anticipated that the new statute will be used widely,[17] States may on occasion wish to request Federal care for particular prisoners who need facilities available in the Federal prison system but not in their own. *For example, a State may wish to transfer a vicious intractable offender who cannot be handled readily in its own institutions, or a female prisoner for whom appropriate facilities are not available,* or a prisoner needing special medical or psychiatric care.

Thus, at the time 18 U.S.C. 5003(a) was enacted, the Bureau contemplated that it would accept custody of state transferees for purposes ranging from medical or psychiatric care to maximum security or even simple custody. The Bureau advises us that it has adhered to its initial interpretation of the

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[17] As of December 31, 1980, only 836 of the approximately 24,000 prisoners in the federal system were state transferees. There are presently approximately 300,000 prisoners in state penal institutions and an additional 200,000 in local jails. No breakdown is available showing the proportions of the 836 transferees who have been transferred for specialized "treatment" purposes, for provision of adequate high-security incarceration, or for simple custody. Figures are available showing the number of state transferees who are being held in maximum security federal facilities (see pages 35-36, *infra*), but some of them may have been transferred at least in part for other "treatment" purposes.

statute, accepting custody of state prisoners under Section 5003(a) contracts without requiring the state to show the existence of any specialized "treatment" need.[18] As petitioner points out (Br. 4), "[t]he Bureau normally accepts all prisoners referred to

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[18] We have reviewed a number of the Section 5003 contracts entered into over the years between the federal government and various states and territories. Most recite that the state has requested permission to transfer one or more prisoners to the federal system and that the Director has certified that "facilities" are available, and provide that the state shall submit a separate application for each individual proposed for transfer (as is required under the Vermont contract with respect to transfers in excess of 40 prisoners, the number the federal government agreed in advance to take under the contract; see J.A. 11). These contracts make no mention of "treatment facilities" and refer to "treatment" only in stating that the federal government "will undertake the custody, care and treatment" of state prisoners and that the state will defend lawsuits involving their "custody, care, subsistence and treatment."

We have found two contracts—one with Alaska in 1960 (since superseded) and one with the Virgin Islands in 1966—that depart from this format and state that the Director shall assume custody if he certifies "that proper and adequate treatment facilities and personnel are available for the custody, care, subsistence, education, treatment, and training of such prisoner." Because of the age of these two contracts, the Bureau is unable to inform us of the reason for their atypical content. The practice in all cases, as far as the Bureau is aware, has been to consider treatment needs, if any, not as a precondition to accepting a transfer, but only as part of the classification process whereby a prisoner is assigned to a particular institution. Whatever the explanation for these two isolated departures from the standard contract format, they do not undermine the force of the fact that the Bureau has consistently understood and applied the statute to authorize transfer without a showing by the state of a particularized need for medical treatment or the like on the part of an individual transferee.

it * * *." That contemporaneous and consistent construction by the agency that suggested the statute's enactment and is charged with its enforcement is entitled to great deference.

D. To Construe the Statute as Petitioner Suggests Would Frustrate its Underlying Purpose by Preventing the Federal Government from Providing Needed Assistance to the States

As we have shown above, Section 5003 was designed as a reciprocal measure to the broad existing statutory authority permitting transfer of federal prisoners to state custody. The intent was to aid the effective and economical operation of both state and federal prison systems. If petitioner's construction of the statute is correct, however, the federal government is without authority to accept custody of state prisoners, no matter how beneficial such action would be to the state prison system or indeed to the prisoner himself, unless the transferee can be shown to have a narrowly defined need for specialized "treament." This cramped construction of the Attorney General's contracting authority has significant detrimental consequences.

For example, in those cases in which a determination of a need for specialized treatment could not be made, a state inmate who could benefit from other aspects of federal incarceration would be precluded from transfer. As the court below put it (J.A. 44), "[a]dopting [petitioner's] view of the statute would mean that a wholly incorrigible or, on the other hand, fully rehabilitated prisoner, incarcerated not for treatment, but solely for purposes of deterrence, could not be transferred from state to federal custody

solely to take advantage of training and educational opportunities available only at federal facilities. Nothing in the legislative history of 18 U.S.C. 5003 suggests such a distinction between prisoners incarcerated for purposes of reform and those incarcerated for deterrence or other purposes."

Another untoward consequence of petitioner's restrictive construction of the statute is that the federal government would be precluded from affording protective custody to a state prisoner who was in danger from his fellow state inmates, in the absence of a showing that the state prisoner was otherwise in need of "specialized treatment" available only in the federal system.

Vermont is not unique among the states in its need for maximum security or other federal facilities for its inmates. As of December 31, 1980, the Bureau of Prisons had contracts with 44 states or territories pursuant to which 836 state or territorial prisoners were being held in federal custody. The largest state contingent was 172 prisoners from New Mexico, most of whom had been transferred as a result of the massive disruption in the New Mexico State Penitentiary on February 2 and 3, 1980. Similarly, as a result of riots in Idaho's maximum security penitentiary on July 23, 1980, the Bureau of Prisons agreed to the Governor of Idaho's request that it assume custody of 111 Idaho prisoners (not all of whom still remain in the federal system). Of the 836 state and territorial prisoners, 343 are confined in institutions rated security level 5 or 6, the two highest security levels in the federal system.[19]

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[19] Only the United States Penitentiary at Marion, Illinois, is rated security level 6. The United States penitentiaries at

This Court is well aware of the severe overcrowding problems in state and local penal institutions. See, *e.g.*, *Rhodes* v. *Chapman*, No. 80-332 (argued Mar. 2, 1981). At the time of trial in that case, the Southern Ohio Correctional Facility at Lucasville, Ohio's only maximum security penitentiary, housed approximately 38% more inmates than it was designed to hold (*Chapman* v. *Rhodes*, 434 F. Supp. 1007, 1020 (S.D. Ohio 1977), aff'd without opinion, No. 78-3365 (6th Cir. June 6, 1980)). In a February 1, 1981 Status Report on the Courts and Prisons, the National Prison Project of the American Civil Liberties Union stated that there are 39 states or territories "in which there are existing court decrees, or pending litigation, involving the entire state prison system or the major institutions in the state and which deal with overcrowding and/or the total conditions of confinement." [20]

In mid-December 1980 the entire federal system was actually slightly short of its rated physical capacity. See Memorandum for the United States as Amicus Curiae filed in *Rhodes* v. *Chapman*, *supra*, at chart III.[21] To the extent that such surplus facilities can be used to alleviate the states' problems, whether they be lack of maximum security facilities, lack of treatment programs or overcrowding in general, the purposes of Section 5003 would be furthered.

Leavenworth, Kansas, Lewisburg, Pennsylvania, and Terre Haute, Indiana, and the Federal Corrections Institution at Lompoc, California, are all rated security level 5.

[20] Overcrowding is specifically at issue in 34 of these 39 states and territories.

[21] We have served copies of our memorandum on petitioner and respondent Ciuros.

II. EVEN IF 18 U.S.C. 5003(a) CONDITIONS STATE-TO-FEDERAL TRANSFERS ON A PRISONER'S NEED FOR TREATMENT AVAILABLE ONLY IN THE FEDERAL SYSTEM, PETITIONER IS PROPERLY IN FEDERAL CUSTODY ON THE BASIS OF HIS NEED FOR MAXIMUM SECURITY INCARCERATION

Even if the statute read as petitioner urges this Court to construe it—that no state prisoner may be transferred to the federal prison system unless he needs specialized treatment available only in the federal prison system—petitioner nonetheless would not be entitled to relief. If need for "treatment" is a precondition to exercise of the contracting authority in Section 5003, the concept of "treatment" should be construed broadly to include the provision of maximum security incarceration facilities offering programs appropriate for long term custodial confinement, where the state is unable to provide such facilities and proper treatment of the particular inmate requires them.[22]

We deal with this issue briefly here, both because much of what we have already said supports our argument but does not require repetition, and because it is one on which the circuits are not divided. Even the Seventh Circuit, which alone supports petitioner's primary submission that the federal authority to accept custody of state prisoners is limited to individuals who are in need of "treatment" (*Anthony* v. *Wilkinson*, Nos. 79-2362, etc. (Dec. 23, 1980), petition for cert. pending *sub nom. Hawaii*

[22] We note that even in the cases of prisoners whose transfers are prompted solely by security needs, it is nevertheless true that "adequate treatment facilities and personnel are available" in the event the prisoner should need medical, psychiatric, or similar narrowly defined "treatment."

v. *Mederios*, No. 80-1315 (filed Feb. 4, 1981); *Lono* v. *Fenton*, 581 F.2d 645 (1978) (en banc)), includes within the definition of "treatment" security and protective custody, where accompanied by a sufficient array of programs.

While the question was not raised in *Lono* v. *Fenton*, *supra*, in *Anthony* v. *Wilkinson*, *supra*, the Seventh Circuit summarized its views as follows (slip op. 19):

> We think that even something so far removed from traditional notions of "treatment" as high security incarceration, with the opportunity to participate in attendant religious, educational, recreational and other programs, in particular cases may satisfy § 5003. We can perceive these conditions as meeting "some special treatment need with which the state required assistance." *Lono* v. *Fenton*, 481 F.2d at 648. Nothing in *Lono* precludes such a relatively broad construction of "specialized treatment."

More broadly, and in view of the cases before it that involved transfers for protective custody as well as for maximum security incarceration (see *Anthony* v. *Wilkinson*, *supra*, slip op. 6 n.5 (appellee Killary), 8 n.8 (appellee McKay)), the *Anthony* court endorsed transfers that "were for security and related reasons * * *" (Slip op. 15).

The Congress that passed Section 5003 legislated during an era in which paramount emphasis was placed upon the rehabilitative objectives of the correctional system. It is most reasonable to conclude that the educational, training, and counseling programs provided inmates of federal penitentiaries were considered to be embraced within the concept of "treatment" employed in the rehabilitative process even for dangerous offenders in maximum security

custody. A construction of the word "treatment," as used in 18 U.S.C. 5003(a), that includes maximum security incarceration and protective custody also comports with the Bureau's contemporaneous and consistent construction of the statute. As noted above (page 32, *supra*), in its *1952 Annual Report*, in describing the then new statute, the Bureau suggested as an example of the situations to which Section 5003 would be applicable a case where "a State may wish to transfer a vicious intractable offender who cannot be handled readily in its own institutions * * *." From that time to the present, the Bureau consistently has contracted under Section 5003 for the receipt of state prisoners in need of maximum security incarceration or protective custody. It is well settled that such a "construction of a statute by those charged with its execution should be followed unless there are compelling indications it is wrong * * *." *E.I. DuPont DeNemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Accordingly, petitioner's transfer to federal custody, which could provide maximum security as well as a broad range of other programs (see note 12, *supra*), was entirely proper.[23]

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[23] The district court found (J.A. 33; emphasis added): "As a resident in a federal maximum security penitentiary, [petitioner] had the same complete freedom of movement within the institution as the other prisoners. At St. Albans, [petitioner] did not enjoy this freedom of movement within the institution and was more or less confined to D [the maximum security] wing. The programs at St. Albans, however, were substantially similar to those at the federal institutions *although somewhat less accessible to [petitioner] because of restrictions on his ability to move about the St. Albans Facility.*"

III. EVEN ASSUMING THAT SECTION 5003(a) CREATES A LIBERTY INTEREST IN A STATE PRISONER IN NOT BEING TRANSFERRED TO THE FEDERAL PRISON SYSTEM EXCEPT FOR THE PURPOSE OF TREATMENT, PETITIONER HAS RECEIVED ANY PROCESS THAT WAS DUE HIM

For the reasons stated in Part I above, we submit that 18 U.S.C. 5003(a) is an unconditioned grant of authority to the Attorney General to contract with the states for the custody of state prisoners and, accordingly, creates no liberty interest in a state prisoner in not being transferred to federal custody.[24] Even as-

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[24] In *Meachum* v. *Fano*, 427 U.S. 215 (1976), and *Montanye* v. *Haymes*, 427 U.S. 236 (1976), this Court held that a state prisoner has no liberty interest in not being transferred to another state prison, the conditions of which are substantially less favorable to him, absent a state law or practice conditioning such transfers on proof of serious misconduct or the occurrence of other specific events. Petitioner apparently agrees with us that the *Meachum-Montanye* rationale applies with equal force to state-to-federal transfers, since the sole basis for petitioner's asserted liberty interest is 18 U.S.C. 4001 and 5003 (Br. 27-29, 43). Arguably, petitioner also could have premised a liberty interest on Vt. Stat. Ann. tit. 28, § 706(a) (Cum. Supp. 1980), which authorizes the transfer of a Vermont inmate to a federal correctional facility when, in the opinion of the Commissioner of Corrections of the State of Vermont, (a) the inmate needs particular treatment or special facilities available at the federal correctional facility, (b) all in-state treatment and rehabilitative programs available for the inmate have been considered and found unsuitable, (c) all in-state security and custody alternatives for the inmate have been considered and found unsuitable, or (d) the inmate voluntarily requests transfer. Petitioner presumably does not make that argument because he recognizes that the Vermont state procedure (described *infra*) afforded him all the process he was due in connection with any liberty interest created by the state statute.

Amici Family & Friends of Prisoners, Inc., Criminal Justice Program of the New England Regional Office of the

suming, however, that Section 5003(a) does create a liberty interest in a state prisoner not to be transferred to federal custody except for the purpose of treatment, petitioner has received any process that was due him.

American Friends Service Committee, and Massachusetts Senator Jack H. Backman assert an independent constitutional right in "family integrity," the existence of which, they claim (Amici Br. 33), "does not depend on whether or not there is a relevant federal or state statute creating an entitlement or a legitimate expectation to stay in one state prison rather than another." But the impairment of the integral family unit is an inescapable concomitance of conviction and incarceration. To argue that state defendants have a right not to have that consequence of conviction aggravated by transfer to a distant federal prison is to assume that state prisoners are afforded a constitutional right not afforded to federal prisoners, who, by statute, can be assigned and transferred to any federal institution in the country. 18 U.S.C. 4082(b). Cf. *Meachum* v. *Fano, supra; Montanye* v. *Haymes, supra.*

Amici also assert (Amici Br. 40) a liberty interest in access to the courts, which, they argue, will be denied by transfer from state to federal custody. On the facts of the present case, however, amici's claim is unfounded. The Supreme Court of Vermont has noted (*In re Morse,* 138 Vt. 327, 329 n.1, 415 A.2d 232, 232-233 n.1 (1980)) that Vermont offenders who are transferred to federal institutions remain entitled to representation by the Vermont Public Defender's Office under Vt. Stat. Ann. tit. 13, § 5232(2) (Cum. Supp. 1977). See also *Battick* v. *Stoneman,* 421 F. Supp. 213, 230 (D. Vt. 1976). Nor is there merit to amici's claim (Amici Br. 40) of insufficient access to legal materials. See *Hohman* v. *Hogan,* 458 F. Supp. 669 (D. Vt. 1978).

Finally, amici claim (Amici Br. 18) that the transfer of a state prisoner to federal custody violates the Eighth Amendment. Petitioner has never raised this claim (see *Knetsch* v. *United States,* 364 U.S. 361, 370 (1960)), and, in any event, it is frivolous.

Petitioner contends (Br. 26-29) and the Seventh Circuit has held (*Anthony* v. *Wilkinson*, *supra*, slip op. 19-31), that the *federal government* owes a state prisoner scheduled for transfer to the federal system the same amount of process that is due a parolee whose parole is sought to be revoked (*Morrissey* v. *Brewer*, 408 U.S. 471 (1972)) or a state prisoner whose transfer to a mental institution is sought (*Vitek* v. *Jones*, 445 U.S. 480 (1980)). There is no merit to this claim.[25]

In *Morrissey*, this Court held that because "the liberty of a parolee * * * includes many of the core values of unqualified liberty" (408 U.S. at 482) and because revocation of parole is lawful only when a violation of parole conditions has in fact occurred (*id.* at 480), parole cannot be revoked in the absence

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[25] We note that petitioner did not raise, nor did either of the courts below rule on, the due process issue. Accordingly, this Court need not reach this issue. *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n.7 (1977); *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Lawn* v. *United States*, 355 U.S. 339, 362-363 n.16 (1958). Nor do we view the due process issue as "fairly included" in the question set forth in the petition. Rule 21.1(a) of the Rules of the Supreme Court. See *Lawn* v. *United States*, *supra*, 355 U.S. at 363 n.16.

In our view, as set forth above, 18 U.S.C. 5003(a) is an unconditional grant of authority to the Attorney General to contract with the states for the custody of state prisoners. Accordingly, we submit, the statute creates no liberty interest implicating the Due Process Clause. If the Court disagrees with that primary submission, however, it may wish to reach the due process issue in the interest of judicial economy, since the issue is presented in other petitions presently pending. See *Hawaii* v. *Mederios*, No. 80-1315 (filed Feb. 4, 1981); *Beshaw* v. *Fenton*, No. 80-6354 (filed Mar. 13, 1981).

of written notice to the parolee of the claimed violation of parole, disclosure of the evidence against him, an opportunity for him to be heard in person and to present witnesses and documentary evidence, the right to confront and cross-examine adverse witnesses, a "neutral and detached" hearing body, and a written statement by the factfinders as to the evidence relied on and the reasons for revoking parole (*id.* at 489).[26] In *Vitek* v. *Jones*, 445 U.S. 480 (1980), the Court held that a prisoner scheduled for involuntary transfer to a state mental hospital for treatment of a mental disease or defect was entitled to the same procedural safeguards because the liberty interest in avoiding confinement in a mental hospital was not extinguished by the criminal conviction and because "[t]he interest of the prisoner in not being arbitrarily classified as mentally ill and subjected to unwelcome treatment is * * * powerful * * * and * * * the risk of error in making the determination[] [of mental disease or defect] is substantial * * *" (*id.* at 495).

This Court has required fewer procedural safeguards where the deprivation to the prisoner is less severe, where the interest of the state is more substantial, or where additional procedures would not materially decrease the risk of an erroneous determination of the facts upon which the government's power to act is conditioned. See *Greenholtz* v. *Nebraska Penal Inmates*, 442 U.S. 1 (1979) (in view of Nebraska's "necessarily subjective * * * and predictive * * *" (*id.* at 13) discretionary parole release determinations, due process is satisfied by affording

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[26] In *Gagnon* v. *Scarpelli*, 411 U.S. 778 (1973), applying *Morrissey* to probation revocation proceedings, the Court held that whether due process also requires the appointment of counsel is to be decided on a case-by-case basis.

the inmate an opportunity to be heard and advising him, if parole is denied, in what respects he fell short of qualifying); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974) (prison disciplinary proceedings that may result in the loss of good time must be preceded by at least 24-hours' advance written notice of the claimed violation, must be followed by a written statement of the factfinders as to the evidence relied upon and the reason for the disciplinary action taken, and must permit the inmate to call witnesses and present documentary evidence in his defense "when permitting him to do so will not be unduly hazardous to institutional safety or correctional goals" (*id.* at 566), but need not permit the inmate to confront and cross-examine the witnesses against him nor, under usual circumstances, permit the assistance of retained or assigned counsel). See generally *Mathews* v. *Eldridge*, 424 U.S. 319 (1976).

In sum, "due process 'is flexible and calls for such procedural protections as the particular situation demands.'" *Greenholtz* v. *Nebraska Penal Inmates*, *supra*, 442 U.S. at 12, quoting *Morrissey* v. *Brewer*, *supra*, 408 U.S. at 481. Whatever process, if any, petitioner's particular situation demanded, he was afforded it, and more.

The loss suffered by petitioner in this case is substantially less severe than those suffered by the prisoners in *Morrissey* and *Vitek*. For petitioner, it is not a question whether he will remain incarcerated or live outside the walls. Nor is it the difference between penal incarceration and involuntary commitment in a mental institution. Rather, for petitioner, it is an increment in the separation from family and friends that is already an inevitable concomitance of conviction and incarceration. Indeed, it is no more than what may be suffered by any federal prisoner, all of

whom are subject to incarceration anywhere in the country. 18 U.S.C. 4082(b). Of course, "[i]t is the policy of the Federal Prison System to assign inmates [federal and state offenders alike] to an appropriate facility closest to the area of anticipated release. To the degree possible the person shall be designated to that Bureau facility which has the appropriate security features *and* is closest to the inmate's release residence." Federal Prison System, U.S. Department of Justice, *Program Statement* 5100.1 CN-2 § 3, at 2 (July 14, 1980) (emphasis in original). There is no suggestion that petitioner was not assigned on the same basis as any similarly situated federal prisoner would be.

In view of the nature of petitioner's interest, the process he was afforded was more than sufficient to preclude any undue risk of his being deprived of that interest erroneously. As described above (pages 4-5, *supra*), pursuant to Vermont Department of Corrections Policy No. 891 (J.A. 14-18), the Vermont Department of Corrections held a hearing to determine whether petitioner should be transferred to an out-of-state institution. Petitioner was afforded six days' advance notice of the hearing and of the reasons for the proposed transfer. He appeared at the hearing and was represented by lay counsel, who submitted various items of evidence in opposition to the proposed transfer. As a result of the hearing, petitioner's out-of-state transfer was recommended both because "[a]ll in-state treatment and rehabilitative programs available for [petitioner] have been considered and determined unsuitable" and because "[a]ll in-state alternatives in the area of security have been considered and found unsuitable for providing the required degree of security or protective custody for [petitioner] * * *" (J.A. 22). Thereafter, the Federal Bureau of Prisons "programmed petitioner into [its] system

by the same criteria used for federal prisoners, *i.e.*, custody and general rehabilitation considerations" (Pet. Br. 27).

By this procedure, Vermont, the entity with the most information concerning petitioner's needs and its own capacities, made a determination of those factors in a procedural setting satisfying at least the *Wolff* standards (and, indeed, the *Morrissey* standards, except for the apparent failure to allow petitioner an opportunity to cross-examine and confront witnesses; see *Anthony* v. *Wilkinson*, *supra*, slip op. 28 n.25). Thereafter, the Director of the Bureau of Prisons determined the question as to which he was the most informed, that is, whether the Bureau had the maximum security facilities to accommodate petitioner. But that type of determination called for no hearing—indeed, for no input from petitioner at all. Moreover, petitioner's suggestion (Br. 26-29), in line with the *Anthony* court's holding (slip op. 26-30), that the Director should have duplicated the state's inquiry into whether petitioner needed maximum security incarceration and whether the state could afford him such treatment not only has no basis in the statutory language (which requires the Director only to certify whether federal facilities are available), but also would have been wasteful in light of the inquiry already conducted by Vermont and would have increased the likelihood of an erroneous determination, since those are the areas with which the Director is least familiar.[27] In sum, whatever process, if

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[27] We additionally note that requiring the Director to make an independent determination whether the state prison system can satisfy the needs of its inmates would constitute a serious federal intrusion into an area traditionally relegated to state law. As this Court frequently has recognized, the internal administration of state prisons is a matter of utmost concern to the individual states. See, *e.g.*, *Meachum* v. *Fano*,

any, may have been due petitioner, it was exceeded by the extensive procedures afforded him by the State of Vermont and the Director's certification that federal facilities were available.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APRIL 1981

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supra, 427 U.S. at 228-229 ("[h]olding that [intra-state transfers of prisoners not conditioned by state law or practice on proof of serious misconduct or other specific events] are within reach of the procedural protections of the Due Process Clause would place the Clause astride the day-to-day functioning of state prisons and involve the judiciary in issues and discretionary decisions that are not the business of federal judges. We decline to so interpret and apply the Due Process Clause. The federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the states"); *Preiser* v. *Rodriguez*, 411 U.S. 475, 491-492 (1973) ("It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations and procedures, than the administration of its prisons").

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